

**NO. 47212-1-II**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL MCBEE, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Edmund Murphy

No. 13-1-01267-9

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**Supplemental Brief of Respondent**

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## Table of Contents

A.	<u>ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR</u> .....	1
1.	Has defendant failed to show the absence of a tactical reason for not requesting a <i>Petrich</i> instruction when the instruction could have undermined the defense theory of the case?.....	1
2.	Where a <i>Petrich</i> instruction was not required, has defendant failed to show he was actually prejudiced by defense counsel's choice not to request one? .....	1
B.	<u>SUPPLEMENTAL ARGUMENT</u> . ....	1
1.	DEFENSE COUNSEL WAS NOT INEFFECTIVE BECAUSE COUNSEL CHOSE NOT TO REQUEST AN INSTRUCTION THAT COULD HAVE UNDERCUT THE DEFENSE THEORY OF THE CASE. FURTHER, DEFENDANT HAS FAILED TO PROVE THE REQUISITE PREJUDICE BECAUSE A <i>PETRICH</i> INSTRUCTION WAS NOT REQUIRED IN THIS CASE. ....	1
C.	CONCLUSION. ....	5

## Table of Authorities

### State Cases

<i>State v. Brett</i> , 162 Wn.2d 136, 198, 892 P.2d 29 (1995) .....	2
<i>State v. Carson</i> , ___ Wn.2d ___, 357 P.3d 1064 (2015).....	2, 3, 4, 5
<i>State v. Emery</i> , 174 Wn.2d 741, 755, 278 P.3d 653 (2012).....	2
<i>State v. Garrett</i> , 124 Wn.2d 504, 519, 881 P.2d 185 (1994).....	2
<i>State v. Kyllo</i> , 166 Wn.2d 856, 863, 215 P.3d 177 (2009).....	4
<i>State v. McFarland</i> , 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995)....	1, 2
<i>State v. Robinson</i> , 138 Wn.2d 753, 765–69, 982 P.2d 590 (1999).....	4
<i>State v. Thomas</i> , 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987) .....	1

### Federal and Other Jurisdictions

<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	1, 4
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A. ISSUES PERTAINING TO APPELLANT'S SUPPLEMENTAL ASSIGNMENT OF ERROR.

1. Has defendant failed to show the absence of a tactical reason for not requesting a *Petrich* instruction when the instruction could have undermined the defense theory of the case?
2. Where a *Petrich* instruction was not required, has defendant failed to show he was actually prejudiced by defense counsel's choice not to request one?

B. SUPPLEMENTAL ARGUMENT.

1. DEFENSE COUNSEL WAS NOT INEFFECTIVE BECAUSE COUNSEL CHOSE NOT TO REQUEST AN INSTRUCTION THAT COULD HAVE UNDERCUT THE DEFENSE THEORY OF THE CASE. FURTHER, DEFENDANT HAS FAILED TO PROVE THE REQUISITE PREJUDICE BECAUSE A *PETRICH* INSTRUCTION WAS NOT REQUIRED IN THIS CASE.

To demonstrate ineffective assistance of counsel, a defendant must show two things: (1) defense counsel's representation fell below an objective standard of reasonableness in light of all circumstances, and (2) defense counsel's representation prejudiced the defendant. *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995); *State v. Thomas*, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987) (applying the two-prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To show prejudice, defendant must show

that, except for counsel's alleged errors, the result of the proceeding would have been different. **McFarland**, 127 Wn.2d at 335.

The burden is on the defendant alleging ineffective assistance to show deficient representation based on the record below. **McFarland**, 127 Wn.2d at 335. There is a strong presumption that counsel's representation was effective. *Id.*; **State v. Brett**, 162 Wn.2d 136, 198, 892 P.2d 29 (1995). The failure of a defendant to show either deficient performance or prejudice defeats his claim. **State v. Emery**, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). Further, a claim for ineffective assistance of counsel fails if the actions of counsel go to the theory of the case or to legitimate trial tactics. **McFarland**, 127 Wn.2d at 336 (citing **State v. Garrett**, 124 Wn.2d 504, 519, 881 P.2d 185 (1994)).

A recent Supreme Court case dealt with a similar ineffective assistance of counsel claim where defense counsel objected to a proposed **Petrich** instruction. **State v. Carson**, \_\_ Wn.2d \_\_, 357 P.3d 1064 (2015). The Court held that defense counsel's objection to the proposed **Petrich** instruction did not constitute deficient performance because of counsel's broader trial strategy. *Id.* at 1071. In that case, the theory of the defense focused on the credibility of the victim's testimony. *Id.* The Court found that, given this theory, parsing out the individual acts with a **Petrich** instruction may have undercut the defense's theory by suggesting the victim *might have* told the truth about at least some of what happened. *Id.* The Court explained, "At best, then, the **Petrich** instruction was irrelevant

to the defense’s broader trial strategy; at worst, it could have actively undercut that strategy. This further underscores the *reasonableness* of defense counsel’s decision to object to the [*Petrich* instruction].” *Id.* (emphasis added).

In the present case, defendant has failed to prove defense counsel’s performance was not based on a legitimate trial tactic. Counsel’s choice to deny the need for a *Petrich* instruction fit into counsel’s overall trial strategy and theory of the case. Defense counsel’s theory of the case focused on defendant’s alleged inability to form the requisite intent for the crimes. *See* 8RP 766 (“I would submit this is a person who cannot form intent or knowledge. . . . For that reason, I would ask you to find him not guilty of all the charges.”). Given the competing testimony of the experts on defendant’s mental health, this was not an objectively unreasonable trial strategy. *See* Br. of Resp. p. 5–6.

Similar to *Carson*, defense counsel’s theory of the case in the present case—that defendant was unable to form the intent required for any of the crimes charged—may have been undercut by a *Petrich* instruction. The jury could have seen the *Petrich* instruction as a suggestion that defendant *might have* intended at least some of the assaults charged. Therefore, as in *Carson*, it was a legitimate trial strategy for defense counsel to choose not to request a *Petrich* instruction.

Defense counsel on appeal contends that there was “no reason” not to request a *Petrich* instruction in the present case. Supp. Br. of App. p. 6.

The focus on appeal, however, is not what the appellate attorneys and judges believe, in hindsight, the most ideal trial strategy would have been.

As the Court in *Carson* emphasized:

[T]he deficient performance inquiry does not permit us to decide what we believe would have been the ideal strategy and then declare an attorney's performance deficient for failing to follow that strategy. On the contrary, counsel's performance is adequate as long as his challenged decisions "*can be characterized* as legitimate trial strategy or tactics."

*Carson*, 357 P.3d at 1071–72 (quoting *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)). Therefore, because defense counsel's choice at trial not to request a *Petrich* instruction *can be characterized as* a legitimate trial strategy to avoid undercutting the defense's theory of the case, defendant has failed to show counsel's performance was deficient.

Defendant has further failed to prove the requisite prejudice for his ineffective assistance of counsel claim. When reviewing defense counsel's performance—rather than the trial court's failure to give a *Petrich* instruction—the *Strickland* standard is used. *Carson*, 357 P.3d at 1074. Therefore, the defendant is required to demonstrate that his attorney's performance prejudiced him. *Id.* (citing *State v. Robinson*, 138 Wn.2d 753, 765–69, 982 P.2d 590 (1999)). Defendant bears the burden of establishing that "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Carson*, 357 P.3d at 1075 (quoting *Kylo*, 166 Wn.2d at 862).

In the present case, defendant has failed to meet his burden in showing the requisite prejudice for his ineffective assistance of counsel claim. As detailed in the previous brief of the respondent, the prosecutor elected which assaultive act against Deborah Headland relied upon—the single assault inside the house. *See* Br. of Resp. p. 7–9. The prosecutor’s closing argument—and defense counsel’s closing argument—focused on defendant shooting at Deborah Headland while she was inside the house. *See id.* (citing 8RP 726, 731; 8RP 763, 764). Where the State elects in closing, the absence of a ***Petrich*** instruction is harmless, and the defendant cannot show the requisite prejudice for an ineffective assistance of counsel claim. ***Carson***, 357 P.3d at 1075.

Further, even if the State had not elected in closing, a ***Petrich*** instruction was not required because the assaultive acts against Deborah Headland were part of a continuing course of conduct—one that does not require an instruction on jury unanimity. *See* Br. of Resp. p. 9–12. If a ***Petrich*** instruction was not required—as in the present case—defendant cannot show he was prejudiced by defense counsel’s choice not to request such an instruction. Therefore, defendant has failed to prove the requisite prejudice for his ineffective assistance of counsel claim.

D. CONCLUSION.

Defendant has failed to meet his burden in proving ineffective assistance of counsel. Defendant has failed to show that counsel’s strategic

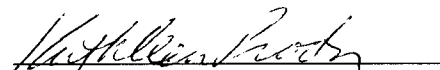


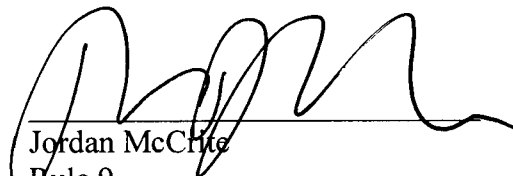
choice not to request a **Petrich** instruction fell below an objective standard of reasonableness. Defendant further has failed to show that defense counsel's performance prejudiced him because a **Petrich** instruction was not required in this case.

Therefore, for these reasons and those set forth in the brief of the respondent, the State respectfully requests this court affirm defendant's convictions.

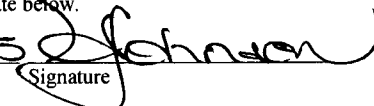
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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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## PIERCE COUNTY PROSECUTOR

**November 30, 2015 - 2:50 PM**

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